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LEE TAK SUAN & ANOR

v.

TUNKU DATO' SERI SHAHABUDIN TUNKU BESAR BURHANUDDIN & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-24-2357-2005]
20 SEPTEMBER 2006

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UNINCORPORATED ASSOCIATIONS: *Societies - Disputes - Derivative action - Whether plaintiffs have legal right to commence derivative action against club - Pre-conditions or elements for derivative action - Whether satisfied - Abdul Rahim Aki v. Krubong Industrial Park - Whether club could be sued - Societies Act 1966, s. 9(c)*

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This summons in chambers at encl. 6 was an interlocutory application by the first, second, third, fourth, fifth and seventh defendants for an order under O. 18 r. 19 of the Rules of the High Court 1980 that the originating summons of the present action be struck out on the ground that the plaintiffs have no legal right to commence a derivative action against the Selangor Turf Club ('the club') because (i) the club had no legal personality; and (ii) as a consequence, the club had not been, and indeed could not be, cited by the plaintiffs as one of the defendants. It was contended by the defendants that in a derivative action the entity concerned must have a legal personality and must be cited as a defendant in the suit. The plaintiffs are members of the club and the first to seventh defendants are members of the committee. The club is a society registered with the Registrar of Societies under the Societies Act 1966 ('the Societies Act'). Pursuant to s. 9(c) of the Act, the eighth defendant (Khaka Singh Dhaliwal) had been named as the public officer against whom legal proceedings should be instituted in any action against the club. The facts were that the plaintiffs had alleged that the committee had purchased 4 million shares in a company known as Fountain View Development Berhad. Prior to the purchase of the Fountain View shares, the committee did not comply with the requirements prescribed by r. 24(b) of the Constitution of the Club. Thus, no notice concerning the purchase was posted or circulated to members of the club. Hence,

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the members of the club, whose monies have been spent by the Committee, have throughout been kept in the dark about this investment. In the said originating summons actions, the plaintiffs instituted a derivative action against the defendants challenging the validity of the purchase of the Fountain View shares.

Held (dismissing the application with costs):

(1) All the pre-conditions or elements required for a derivative action as prescribed in *Abdul Rahim Aki v Krubong Industrial Park* have been satisfied. First, the entitlement of the originating summons expressly stated that the plaintiffs were 'suing on behalf of the members of the Selangor Turf Club, save for the first to seventh defendants, by way of a derivative action'. Secondly, the eighth defendant was 'sued as the public officer of the Selangor Turf Club pursuant to s. 9(c) of the Societies Act 1966'. Paragraphs (6) to (8) of the originating summons expressly pleaded that all damages be paid to the Club (and not to the plaintiffs) in the event that the plaintiffs succeed in the originating summons. Thus the fruits of the litigation would belong to the club. (para 16)

(2) In para 8 of the affidavit affirmed by the first plaintiff in support of the originating summons, it was averred that the wrongdoers against whom this action was instituted, namely the first to seventh defendants, control the management of the club and therefore would not authorize a suit by the club against themselves. That was why the club was not the plaintiff. (para 17)

(3) All the ingredients for a derivative action have been satisfied. The alleged wrongdoers have been cited as defendants (the first to seventh defendants). The club had not been cited as a defendant. However, the club could be sued provided the suing is done in accordance with s. 9(c) of the Societies Act 1966; and accordingly the public officer (Kaka Singh Dhaliwal) of the club had been named as one of the defendants. (para 18)

(4) Whether or not a society registered under the Societies Act, like the Club was an unincorporated association under the laws of Malaysia was not the issue. The issue was whether the club can sue or be sued. By reason of s. 9(c) of the Societies Act, the answer was in the affirmative. (para 19)

Case(s) referred to:
Abdul Rahim Aki v. Krubong Industrial Park [1995] 4 CLJ 551 CA ***(refd)***
Cotter v. National Union of Seamen [1929] 2 Ch 58 ***(not foll)***
Edwards v. Halliwell [1950] 2 All ER 1064 ***(refd)***
Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***
Hodgson v. National & Local Government Officers Association [1972] 1 All ER 15 ***(not foll)***
Taylor v. National Union of Mineworkers [1985] BCLC 237 ***(not foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 rr. 19, 20(a), 24(a), (b)
Societies Act 1966, s. 9(c)

Other source(s) referred to:
HAJ Ford and R P Austin, *Principles of Corporations Law*, 7th edn, Butterworths 1995, p 447

For the plaintiffs - Tommy Thomas; M/s Tommy Thomas
For the 1st, 2nd, 3rd, 4th, 5th & 7th defendants - Dato' V Sithambaram (PN Navaratnam & Ms Chong with him); M/s Sitham & Assoc
For the 6th defendant - Ahmad Moosdeen
8th defendant absent

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Hishamudin Yunus J:

[1] This summons in chambers at encl. 6 is an interlocutory application by the 1st, 2nd, 3rd, 4th, 5th and 7th defendants for an order under O. 18 r. 19 of the Rules of the High Court 1980 that the originating summons of the present action be struck out on the ground that the plaintiffs have no legal right to commence a derivative action against the Selangor Turf Club ('the club) because:

(1) the club has no legal personality; and

(2) as a consequence, the club has not been and, indeed, could not be, cited by the plaintiffs as one of the defendants.

[2] It is contended by the defendants that in a derivative action the entity concerned must have a legal personality and must be cited as a defendant in the suit.

[3] The relevant facts are as follows. The plaintiffs are members of the club. In accordance with r. 20(a) of the constitution of the club, the club is managed by a committee of 8 members ('the committee'). The 1st to 7th defendants are members of the committee. The 1st defendant is the chairman of the committee, whilst the 2nd defendant is the deputy chairman. The 8th member of the committee during the material time, one Mr. Tan Kheng Seng, died on 10 January 2005.

[4] The club is a society registered with the Registrar of Societies under the Societies Act 1966 ('the Societies Act'). Section 9 of the Act states:

> (c) a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society.
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> (e) (i) no judgment in any such suit against a registered society shall be put into force against the person or property of the person sued but against the property of the society.

[5] Pursuant to the above s. 9(c) of the Act, the 8th defendant (Khaka Singh Dhaliwal) has been named as the public officer against whom legal proceedings should be instituted in any action against the club.

[6] Rule 24(a) of the constitution of the club provides:

> All the funds and all the property of the Club shall be vested with the Committee for the time being as Trustees for the ordinary members of the club and the Committee shall have control of such funds and property ...

[7] By virtue of the above r. 24(a) of the constitution, the 1st to 7th defendants, as members of the committee, are trustees of all monies, funds and properties belonging to the club.

[8] Rule 24(b) of the constitution reads:

> In the event of a proposed expenditure of a sum exceeding RM500,000 a notice of such expenditure shall be sent to all Ordinary and Life Members and also posted on the Notice Board at the Secretary's Office for a period of three weeks and if no

A objection is received from at least ten (10) members within three weeks from the date of the notice, the Committee shall be entitled to proceed with such expenditure.

[9] It is alleged by the plaintiffs in the supporting affidavit that the committee had purchased 4 million shares in a company known as Fountain View Development Bhd. The price paid for each share was RM5. Prior to the purchase of the Fountain View shares, the committee did not comply with the requirements prescribed by the aforesaid r. 24(b) of the Constitution. Thus, no notice concerning the purchase was posted or circulated to members of the club.

[10] Further, it is alleged in the supporting affidavit of the plaintiffs that all requests for information and documents pertaining to the purchase of the shares have been rebuffed by the committee. Hence, the members of the club, whose monies have been spent by the Committee, have throughout been kept in the dark about this investment, which amounts to RM30 million.

[11] In this originating summons action, the plaintiffs, as members of the club, have instituted a derivative action against the defendants challenging the validity of the purchase of the Fountain View shares. The following orders are sought in the originating summons:

(1) A declaration that the first to seventh defendants acted in breach of trust when they caused the club to purchase RM30 million worth of shares in Fountain View.

(2) In the alternative, a declaration that the first to seventh defendants acted in breach of their fiduciary duty in causing the club to purchase the said shares.

(3) In the further alternative, a declaration that the first to seventh defendants acted negligently in causing the club to purchase the said shares.

(4) A declaration that the purchase by the first to the seventh defendants of the said shares was *ultra vires* and/or in breach of the constitution and rules of the club.

(5) An order that the first to the seventh defendants fully reimburse the eighth defendant ("the Club") for all losses suffered by the club by reason of the purchase of the said shares.

(6) Alternatively, an order that the first to the seventh defendants pay general damages to the club for all losses suffered by the latter.

(7) An order that the first to the seventh defendants pay aggravated and/or exemplary damages to the club by reason of their willful and reckless conduct.

[12] Under the Societies Act, the club can sue and be sued, and its property can be attached under execution proceedings if any judgment against the club remains unsatisfied: see s. 9(c) of the Societies Act.

[13] In *Principles of Corporations Law*, 7th edn by H A J Ford and R P Austin (Butterworths, 1995) a derivative action is explained as follows (at p. 447):

> Courts of equity recognized that rigid and unvarying application of the principle that the company is the only proper plaintiff for wrongs done to it could produce injustice in some cases. The risk of injustice is obvious where the persons in control of the decision to sue abuse their powers: *MacDougall v. Gardiner* [1875] 1 Ch D 13 at 26. Hence if a decision of a general meeting that the company should not sue would be an abuse of power, there is a case for allowing a representative action to be brought by a member to obtain a remedy for the company.
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> Such an action, where the member sues on behalf of all members other than the wrongdoers to assert the company's rights and to seek relief for the company, is called a derivative action.

[14] The derivative action principle is a consequence of the rule in *Foss v. Harbottle* [1843] 2 Hare 461; 67 ER 189. In *Edwards v. Halliwell* [1950] 2 All ER 1064, Jenkins LJ stated the following principles:

> The rule in *Foss v. Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit questio*. No wrong had

A been done to the company or association and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the B cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right.

C The cases falling within the general ambit of the rule are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complained of is wholly *ultra vires* the company or association the rule has no application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what has been done D amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as minority shareholders' action on behalf of themselves and all others. The reason for this E is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice.

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[15] The leading Malaysia case on the principles pertaining to a derivative action is *Abdul Rahim Aki v. Krubong Industrial Park* [1995] 4 CLJ 551, where Gopal Sri Ram JCA observed as follows (at p. 559):

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> We now turn to consider the one exception with which this case is concerned. It is the derivative action; and ingenious procedural device created by courts of equity; by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because H the wrongdoers are themselves in control of its decision-making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. I The wrongdoers must be cited as defendants. So too must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or

other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

[16] In the present case, I am satisfied that all the pre-conditions or elements required for a derivative action as prescribed in *Rahim Aki* have been satisfied. First, the entitlement of the originating summons expressly states that the plaintiffs are "suing on behalf of the members of the Selangor Turf Club, save for the 1st to 7th defendants, by way of a derivative action". Second, the 8th defendant is "sued as the public officer of the Selangor Turf Club pursuant to s. 9(c) of the Societies Act 1966". Third, paras (6) to (8) of the originating summons expressly plead that all damages be paid to the Club (and not to the plaintiffs) in the event that the plaintiffs succeed in the originating summons. Thus the fruits of the litigation will belong to the Club.

[17] In para. 8 of the affidavit affirmed by the 1st plaintiff in support of the originating summons, it is averred that the wrongdoers against whom this action is instituted, namely, the 1st to 7th defendants, control the management of the club and therefore will not authorize a suit by the club against themselves. That is why the club is not the plaintiff.

[18] Accordingly, all the ingredients for a derivative action have been satisfied. The alleged wrongdoers have been cited as defendants (the 1st to the 7th defendants). It is true that the club has not been cited as a defendant. However, the club can be sued provided the suine is done in accordance with s. 9(c) of the Societies Act; and accordingly the public officer (Kaka Singh Dhaliwal) of the club has been named as one of the defendants.

[19] The defendants contend that the club is an unincorporated association and therefore not a legal entity. With respect, whether or not a society registered under the Societies Act, like the club, is an unincorporated association under the laws of Malaysia is not the issue. The issue is: whether the club can sue or be sued. By reason of s. 9(c) of the Societies Act, the answer is in the affirmative.

A **[20]** The defendants rely on 3 authorities in support of their proposition regarding an unincorporated association, namely:

(i) *Hodgson v. National & Local Government Officers Association* [1972] 1 All ER 15;

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(ii) *Cotter v. National Union of Seamen* [1929] 2 Ch. 58; and

(iii) *Taylor v. National Union of Mineworkers* [1985] BCLC 237

[21] With respect, all these cases are irrelevant. All these cases C were decided by the Courts of England applying English law without reference to any statute in England corresponding to our Societies Act.

[Application dismissed with costs]

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